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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ANTHONY PETROV,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January, 1985

QUESTION PRESENTED

Whether 18 U.S.C. § 1461 was correctly and constitutionally applied to a mere photo processor who neither sold nor distributed obscene materials, but received from the public undeveloped film containing obscene images, machine processed the film and mailed the finished prints back to the photographer?

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Petitioner Anthony Petrov respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on October 5, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which is reported at 747 F.2d at 824 (2nd Cir. 1984), is reprinted in Appendix A.

The opinion of the United States District Court for the Northern District of New York, which is unreported, is reprinted in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit, affirming in part and reversing in part the District Court's judgment of conviction, was entered on October 5, 1984. It is reprinted in Appendix C. A timely petition for rehearing was denied on November 19, 1984. The order on rehearing is reprinted in Appendix D. This petition for certiorari is filed within 60 days of the date of that order in compliance with Rule 20.1 and 20.4. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech . . .

Section 1461, Title 18, United States Code: Mailing obscene or crime-inciting matter:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and
>
> Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and
>
> Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for

producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing –

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than

> $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both for each such offense thereafter.
>
> The term "indecent," as used in this section includes matter of a character tending to incite arson, murder, or assassination.

STATEMENT OF THE CASE

Petitioner is a commercial film processor who operates both a mail order and a retail photo processing business in North Syracuse, New York. During 1982 and 1983 his operation processed approximately four million photographs for people all over the country.

On October 17, 1983 petitioner was convicted, after a jury trial, of one count of conspiracy in violation of 18 U.S.C. § 371 and nine counts of mailing obscene material in violation of 18 U.S.C. § 1461. This conviction was based on a number of allegedly obscene negatives and prints that his mail order operation had mailed back to ten different customers, after machine processing their undeveloped film. No claim was made that petitioner sold or distributed obscene materials, and the eivdence on some of the counts consisted of a single photograph.

Petitioner's pretrial motion to dismiss the indictment on the grounds that 18 U.S.C. § 1461 was improperly applied to the conduct of a photo processor like himself had been denied by the district court. (A-36*)

On appeal from the district court's judgment of conviction, the United States Court of Appeals for the Second Circuit affirmed in part, reversed in part and remanded in part. Each of the three judges on the panel filed separate opinions concurring in part and dissenting in part. The court reversed and

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* Numerals preceded by "A" refer to pages of the appendix at the rear of this petition.

remanded for a new trial the conspiracy count and four of the substantive Section 1461 counts. Petitioner's convictions for the remaining five Section 1461 violations were affirmed.

A majority of the court held that the word "whoever" as used in 18 U.S.C. § 1461 includes photo processors in the position of petitioner, because Congress neither narrowed the statute's scope with limiting language nor carved out a specific exception for photo processors. (A-4) The dissenter believed that such a construction distorts a carefully designed congressional scheme and forces photo processors to become censors. (A-19)

REASONS FOR GRANTING THE WRIT

Congress did not intend 18 U.S.C. § 1461 to apply — nor can it be constitutionally applied — to a mere photo processor who neither sells nor distributes obscene materials, but receives from the public undeveloped film containing obscene images, machine processes the film and mails finished prints back to the photographer.

This is the first case to apply 18 U.S.C. § 1461 to a photo processor. If petitioner's conviction is allowed to stand, intolerable practical and constitutional burdens will be placed on photo processors as well as photographers. Congress never intended such burdens, nor does the First Amendment permit their imposition.

The obscene mail statute was first enacted in 1872, 23 years before George Eastman's popularization of the box camera led in 1895 to the development of film and the emergence of photo processors. Act of June 8, 1872, R.S. § 3893, ch. 335, § 148, 17 Stat. 283 (1872) (the "Comstock Act"). In the long expanse of years since that technological breakthrough, Congress has never indicated that it wished to criminalize the action of a photo processor who mails an obscene photograph back to the photographer who sent him the film. Thus congressional intent

regarding the limits of Section 1461 can only be inferred, bearing in mind this Court's caveat in *Swearingen v. United States*, 161 U.S. 446, 450 (1896): "As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit."

The offense aimed at in Section 1461 "was the use of the mails to circulate or deliver matter to corrupt the morals of the people." *Swearingen v. United States*, 161 U.S. at 450. It is the concern that a presumably innocent human personality might be "debased by crass commercial exploitation of sex" that this Court has identified as the legitimate purpose of obscenity laws. *Paris Adult Theatre I v. Slaton*, 413 U.S. 55, 63 (1973). A photo processor, who receives film from a photographer, processes it and returns it to the photographer, can not reasonably be said to corrupt the morals of the sender. *Cf. Redmond v. United States*, 384 U.S. 264 (1966) (vacating § 1461 convictions of husband and wife for mailing obscene pictures of each other to photo lab and receiving processed prints); *United States v. Reinheimer*, 233 F. 545 (E.D. Pa. 1916) (statute does not include material mailed by sender to himself since statutory purpose is to protect morals). Thus a rigidly literal application of Section 1461 to a photo processor ignores the very premise of the statute.

Congress *has* specifically considered photo processors in connection with other legislation. For example, in enacting the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 98-225, § 2(a), 92 Stat. 7, 8 (codified at 18 U.S.C. §§ 2251-2252 (1982)), Congress considered, but did not adopt, a Justice Department recommendation to include photo processors. *See* S. Rep. No. 95-438, 95th Cong., 2d Sess. 28 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 40, 63. In 1984 Congress amended 18 U.S.C. § 2252 to include anyone who "knowingly reproduces" child pornography for distribution through the mails, which arguably encompasses photo processors. Child Protection Act of 1984, Pub. L. No. 98-292, § 4, 98 Stat. 204. Yet Congress has never seen fit to amend Section 1461 to specifically criminalize the conduct of a photo processor or even to include those who "knowingly reproduce" obscene material for distribution through the mails.

Since application of Section 1461 to a photo processor like petitioner cuts against the moral premise of the statute and has no support in legislative history, the Court's exhortation in *Dunn v. United States*, 442 U.S. 100, 113 (1979), is appropriately noted:

> "Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not plainly and unmistakably proscribed."

The Photo Processor as Censor

In 1982 commercial photo processors in the United States developed over ten and a half billion conventional film exposures. *See* 1983 Photo Marketing Association Report. Film developing is growing at an annual rate of ten percent. *Id.* A typical photo processor's equipment may turn out as many as 12,000 prints per hour. Larger operations have far greater outputs.

Application of Section 1461 to a photo processor obliges him to review each of these prints and try to determine whether or not it is legally obscene.* If it is and he mails it back to the photographer, he has, according to the Second Circuit's holding, violated 18 U.S.C. § 1461. If the processor is not sure as to whether the photograph is obscene, he mails it back at the risk of criminal prosecution. Should he refuse to mail it back or should he destroy it, he may be civilly liable to the photographer. Thus the processor may have to notify the customer and store the questionable prints pending instructions from the photographer.

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* Photo processors, for purposes of quality control, subject prints to high speed review to check for color, clarity, tone, etc., and thus presumably satisfy the scienter requirement for a Section 1461 conviction. *See Hamling v. United States*, 418 U.S. 87, 119-24 (1974).

The implications of these options — both constitutional and practical — are awesome to contemplate. Undoubtedly, since now faced with criminal liability, photo processors like the Eastman Kodak Company* will err well on the side of caution and will refuse to return countless photographs that are not obscene, without any adjudication of obscenity *vel non* by a judicial officer, prompt or otherwise. If such a seizure were conducted by the police, it would be intolerable. *See, e.g., Heller v. New York*, 413 U.S. 483 (1973); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964). Yet the Court of Appeals' decision permits, indeed mandates, that a photo processor effect such a seizure. This act of censorship, compelled by government and affecting the whole public, is "hardly less virulent for being privately administered." *Smith v. California*, 361 U.S. 147, 154 (1959). Moreover, the prospect of their film being seized will have a chilling effect on photographers, who will refrain from sending film to processors, even though that film is not in fact obscene. *Cf. id.* Each of these ramifications is repugnant to the First Amendment.

Forcing photo processors to make obscenity determinations during high-speed monitoring of film printing; to seize questionable film; to notify customers of the seizure; and to inventory the seized film imposes burdens more onerous than Congress intended and infringes on First Amendment protections. Therefore, the Court should grant certiorari to decide whether 18 U.S.C. § 1461 may be correctly and constitutionally applied to film processors or whether more carefully circumscribed legislation is required to adequately safeguard due process and freedom of expression.

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* The Government's position before the Court of Appeals was that the Eastman Kodak Company had violated Section 1461 when it mailed duplicates of trial exhibits to defense counsel. (A-27)

CONCLUSION

For all these reasons, the petition for certiorari should be granted.

January 18, 1985

Respectfully submitted,

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APPENDIX

APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 954 — August Term 1983

(Argued: March 23, 1984 Decided: October 5, 1984)

Docket No. 83-1401

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

ANTHONY PETROV,

Defendant-Appellant.

Before:

LUMBARD, NEWMAN, and PRATT, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Northern District of New York, Howard G. Munson, *Chief Judge*, convicting appellant, after a jury trial, of mailing obscene photographs in violation of 18 U.S.C. § 371.

Affirmed in part, reversed in part, and remanded in part. Judge Lumbard and Judge Newman each concur in part and dissent in part in separate opinions.

WILLIAM C. BRYSON, Department of Justice, Washington, D.C., (Frederick J. Scullin, Jr., United States Attorney for the Northern District of New York, Gregory A. West, Gary L. Sharpe, Assistant United States Attorneys, of Counsel), *for Plaintiff-Appellee.*

HERALD P. FAHRINGER, New York, N.Y. (Lipsitz, Green, Fahringer, Roll, Schuller & James, of Counsel, Diarmuid White, Legal Assistant, on the Brief), *for Defendant-Appellant.*

PRATT, *Circuit Judge*:

Anthony Petrov appeals from a judgment of the United States District Court for the Northern District of New York, Howard G. Munson, *Chief Judge*, convicting him, after a jury trial, of one count of conspiracy in violation of 18 U.S.C. § 371 and ten counts of mailing obscene material in violation of 18 U.S.C. § 1461. For the reasons set forth below, and in the opinions of Judge Lumbard and Newman, counts 1, 2, 3, 5 and 6 are reversed and remanded for a new trial, and counts 7, 8, 9, 10, 11 and 12 are affirmed. Count 4 was dismissed by the trial court.

I. BACKGROUND

Petrov is a commercial film processor. Through his mail order business, Spectra Photo, located in North Syracuse, New York, he develops and prints photographs from exposed film, negatives, and prints mailed to him

by customers. For this business and for his related retail photo processing business, operated from the same quarters under the name Crystal Photo, defendant had 22 full-time employees and several part-time employees. During 1982 and 1983 his combined operations processed approximately four million photographs for people all over the country. Much of Spectra's business was generated through advertisements in numerous "adult" magazines for a "confidential" and "uncensored" photo processing service.

Petrov's prosecution in this case is based primarily on a large number of allegedly obscene photographs that Spectra processed for, and mailed back to, eleven different customers. These processed orders formed the basis for the eleven substantive counts of the twelve count indictment.

After a six-week trial, the jury acquitted Petrov's two employee-codefendants, but found Petrov guilty of mailing obscene material on ten of the eleven substantive counts brought under 18 U.S.C. § 1461. The jury also found Petrov guilty of a conspiracy to violate § 1461 (mailing obscene material) and 18 U.S.C. § 2251 (sexual exploitation of children). Defendant was given concurrent, split sentences of six months' imprisonment, followed by three years' probation. In addition, he was fined $10,000 on count 1 and $5,000 on each of the other ten counts, for a total fine of $60,000.

The significant issues before us on appeal are whether the activities of a photo processor such as Petrov violate 18 U.S.C. § 1461, which prohibits the mailing of obscene matter, and also 18 U.S.C. § 2251, which prohibits the sexual exploitation of children; whether Petrov was prej-

udiced by the trial court's submission of the issue of sexual exploitation of children to the jury; whether there was sufficient evidence to establish that the photographs admitted on counts 7 through 12 appealed to the prurient interest of a clearly defined deviant group; and whether the trial court unduly restricted Petrov's proof of the community standards for obscenity. Further issues raised in the briefs have been considered and rejected as not meriting comment. Relevant facts will be discussed as needed.

II. SECTION 1461

With great force, Judge Newman argues in dissent that the entire indictment should be dismissed because, in enacting 18 U.S.C. § 1461, Congress did not intend to criminalize the activities of commercial photo processors such as Petrov. Yet § 1461, as Judge Newman acknowledges, is broadly worded. It reaches "whoever" knowingly mails obscene matter. This description includes Petrov, who processed obscene photographs and, knowing that the material was obscene, mailed the completed orders back to his customers. *See United States* v. *Reidel*, 402 U.S. 351, 356 (1971). If congress did not intend to subject photo processors to criminal liability under § 1461, it would have written § 1461 to reflect that intent, either by narrowing its scope with limiting language or by carving out a specific exception for photo processors. Not only has congress done neither of these things, but the Supreme Court has consistently construed the language of § 1461 broadly. *See, e.g., Reidel*, 402 U.S. at 355-56; *cf. United States* v. *Orito*, 413 U.S. 139, 141-44 (1973) (§1462). While we might agree with Judge Newman's concern over the wisdom of applying this statute to the activities of commercial photo processors, we think it is for con-

gress, and not this court, to create exceptions to the statute's clearly expressed, broad coverage. We hold, therefore, that the activities in question here fall under the purview of § 1461.

III. Section 2251

Petrov contends that his entire trial was unfairly prejudiced because the government injected the highly volatile issue of child pornography into the proceedings through its charge that defendant conspired not only to mail obscene materials in violation of § 1461, but also to engage in the sexual exploitation of minors in violation of § 2251. This claim consists of two issues: (a) Was Petrov properly charged with conspiracy to violate § 2251? (b) If not, was Petrov unfairly prejudiced by the trial court's denial of his motions to strike the alleged violation of § 2251?

Count 1 of the indictment charged a conspiracy among Petrov, his two codefendants, and others, to commit two offenses against the United States: to mail obscene matter in violation of 18 U.S.C. § 1461, and to sexually exploit minors in violation of 18 U.S.C. § 2251. Petrov does not challenge the legal sufficiency of the § 1461 purpose of the conspiracy. He does challenge, however, the § 2251 purpose, claiming that his activities as a commercial photo processor, the only conduct charged against him in this case, cannot be prosecuted under § 2251.

Section 2251 (a) provides:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in,

> any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

Congress enacted § 2251(a) as part of the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2(a), 92 Stat. 7, 8 (1978) (codified at 18 U.S.C. §§ 2251-53), whose purpose was to combat à proliferation of child pornography throughout the country. S. Rep. No. 438, 95th Cong., 2d Sess. 5-11 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 40, 42-48. Congress believed this legislation was necessary to deal with the commercial exploitation of sexual activity involving children because then-existing federal law focused "almost exclusively on the sale, distribution and importation of obscene materials" and did not "directly address the abuse of children inherent in their participation in the production of such materials. *Id.* at 15, 1978 U.S. Code Cong. & Ad. News at 53.

Indisputably, Petrov had no direct involvement in using, employing, or persuading minors to engage in any explicit sexual conduct depicted in any of the photographs Spectra developed. Instead, the government argues that because processing film is an integral part of the production of child pornography, Petrov's position is not materially distinguishable from that of the person who actually induces the minor to be photographed. Consequently, the government argues, by advertising his avail-

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ability to process such "confidential" photographs, and by repeatedly doing so, Petrov has conspired to violate § 2251. We disagree.

The plain language of § 2251(a) defeats the government's argument. Its proscribed acts are those of someone who "employs, uses, persuades, induces, entices or coerces" a minor to engage in sexually explicit conduct, and even those acts are not covered unless done "for the purpose of producing any visual or print medium depicting such conduct". Section 2251(a) does not purport to proscribe the entire process that creates child pornography; instead, it is narrowly drawn to reach only those people who deal with children directly. Absent some indication that Petrov's conduct aided his customers in procuring the participation of children, we cannot sustain the government's theory.

The fact that some of Petrov's customers may have been repeat customers does not alter this result. There is no evidence that any of the children were enticed or induced after Petrov processed photographs for these customers, or even that he knew when those acts occurred. In fact, since most of Spectra's customers sent in previously developed prints, or negatives of photographs already developed, the connection between Petrov and the children's sexual conduct is even more attenuated than if Spectra had developed and printed them from exposed film. In short, the evidence was insufficient to demonstrate any implicit or explicit agreement by Petrov that contemplated the use of minors for creating pornographic pictures.

Moreover, Pub. L. No. 95-225 also includes § 2252, entitled "Certain Activities Relating to Material Involving

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the Sexual Exploitation of Minors", which, in distinction to § 2251's prohibition of the actual use of minors in photographs depicting sexually explicit conduct, prohibits the transportation or sale of obscene materials involving children. Specifically, § 2252 prohibits the transporting, shipping, mailing, and sale of "any obscene visual or print medium" whose production "involves the use of a minor engaging in sexually explicit conduct" or which depicts such conduct.

On its face, § 2252 appears to strike closer to the facts of this case than § 2251, and Petrov's activity arguably might fall under the language of this section. Yet, the legislative history of § 2252 indicates that congress refused to include any reference to photo processors, despite a specific suggestion to do so by the Department of Justice.

In response to a request from Senator Eastland, chairman of the senate judiciary committee, the justice department issued an opinion on S. 1011, the initial bill introduced on the subject of child pornography. Among other things, the justice department observed:

> [S]ince we view the bill as an attempt to deal with the commercial exploitation of sexual activity involving children, subsection 2252(a)(2) should be amended to include any individual who manufactures, reproduces or duplicates the subject films or photographs with the requisite intent as well as those who receive or sell such films or photographs. *This will enable the bill to cover film processing laboratories and others who are instrumental in the distribution process and who are aware of the nature of the material and the use of the mails or facilities of interstate or foreign commerce.*

S. Rep. No. 438 at 28, 1978 U.S. Code Cong. & Ad. News at 63 (emphasis added).

This failure to include such an amendment in the final bill takes on added significance in light of the fact that the judiciary committee eventually decided not to report out S. 1011, largely because of the justice department's position on the entire bill. *Id.* at 11, 1978 U.S. Code Cong. & Ad. News at 48. Instead, a new bill, S. 1585, was drafted "so as to correct a number of the faults that the Justice Department had found with S. 1011." *Id.* at 13-14, 1978 U.S. Code Cong. & Ad. News at 51. Although the new bill incorporated many of the changes suggested by the justice department, it conspicuously omitted any reference to "photoprocessors" or anyone else "instrumental in the distribution process". From the foregoing history and the fact that S. 1585 was passed by the senate and, in substance, enacted into law as Pub. L. No. 95-225, we infer that congress intended to exclude photo processors from § 2252.

Although the justice department's suggestion pertained specifically to § 2252 and not § 2251, we think the fact that congress included no reference whatsoever in its final version of Pub. L. No. 95-225 to anyone who "manufactures, reproduces or duplicates film or photographs" demonstrates its intent not to include such persons under either § 2251 or § 2252.

Despite the dictum of the Seventh Circuit in *United States* v. *Langford*, 688 F.2d 1088 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 2433 (1983), relied on by the government and the district court, that "Congress clearly intended that § 2251 *et seq.* eradicate the *entire commercial chain* involved in production, distribution and sale of

child pornography", 688 F.2d at 1097 (emphasis added), we think the legislative history of the act belies any explicit or implicit intention to apply this statute to photo processors such as Petrov.

Finally, our interpretation of the statute was somewhat strengthened by congress itself, which only this year amended § 2252 by adding to its prohibitions conduct that is arguably aimed at mail-order photo processors, among others. To those who were already subject to the sanctions of § 2252, congress added anyone who "knowingly *reproduces any visual depiction* [of a minor engaged in explicitly sexual conduct] *for distribution* in interstate or foreign commerce or *through the mails*". Child Protection Act of 1984, Pub. L. No. 98-292, § 4, 98 Stat. 204 (1984) (emphasis added). On its face this language would seem to cover photo processors, although the house report accompanying the bill explained that this "reproduction offense" is aimed at "the producer who pirates photos from other publications or who purchases photos for reproduction." H.R. Rep. No. 536, 98th Cong., 1st Sess. 3 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 492, 494. We thus have a possible conflict as to whether congress intended to limit the scope of § 2252 to the specific type of "producer" described in the legislative history, or whether it intended the coverage of § 2252 to extend to photo processors, as its language seems to imply. Whatever the resolution of this issue, which is not before us and which we do not attempt to resolve, the amendment of § 2252 to include "producers" underscores the fact that, prior to this amendment, § 2251 "seem[ed] to require that a producer also be directly involved in inducing the child to pose for the photography in question before violating the Act." H.R. Rep. No. 536 at 3, 1984 U.S. Code Cong. & Ad. News at 494.

We conclude, therefore, that the trial court erred in submitting to the jury the issue of whether Petrov conspired to sexually exploit children, because his activities as a photo processor do not fall within the proscriptions of § 2251. That brings us to the question of whether Petrov was unfairly prejudiced by the trial court's handling of the issue. We conclude that he was prejudiced, not only as to the alternative basis for the conspiracy count (count 1), alleging conspiracy to violate § 1461, but also as to four of the substantive violations (counts 2, 3, 5, and 6), in which the allegedly obscene material sent were photographs of children

The evidence introduced on count 1 is more inflammatory than that introduced in counts 2, 3, 5, and 6. The photographs introduced on counts 2, 3, 5, and 6 are relatively innocuous pictures of nude boys, some, if not all, of whom are apparently under the age of 16. In each count most of the photographs are of one person. With one exception, none depicts explicit sexual activity, except for a few where a boy is shown fondling his genitals. Among the photographs introduced on count 1, however, are some which do depict sexually explicit conduct, primarily oral intercourse, involving children. The spillover prejudice from the count 1 photographs was greatly compounded when the trial court, at one point in its charge on the conspiracy count, equated sexual exploitation of children with mailing obscene photographs. In effect, the trial court instructed the jury that the substantive counts of the indictment involved sexual exploitation of children, whereas, in fact, they charged only mailing obscene matter. This prejudice was further augmented by a reference in the prosecutor's summation to counts 2 through 6 as dealing "with obscene material that's involving kids". In essence, without the spillover

effect of the inflammatory photographs introduced on count 1, coupled with the court's instruction and the prosecutor's references to child pornography, we cannot be confident that the jury would have found the photographs introduced on the substantive counts to be obscene.

In sum, we think that the trial court's handling of the § 2251 issue, when viewed in the light of its instructions, the evidence presented, and the government's summation, requires reversal of Petrov's convictions and a new trial on count 1 (as it relates to § 1461), and counts 2, 3, 5, and 6. The spillover prejudice from count 1, did not, however, affect counts 7 through 12 since the photographs in those counts involved adults and were clearly distinguishable in content and context from any possible sexual exploitation of children. There are other issues with respect to those counts, however, which do require our attention.

IV. Deviant Groups

Counts 7 through 12 all alleged that Petrov mailed obscene materials. In counts 8, 10, 11, and 12 the allegedly obscene materials were photographs depicting bondage, torture, and body mutilation. Counts 7 and 9 involved photographs depicting sexual activity between either men or women and various animals. Petrov contends that the photographs in all six of these counts are so disgusting as to be incapable of appealing to the prurient interest of the average person under the contemporary community standards test for obscenity, and that the government failed to present the expert testimony necessary to establish that the photographs would appeal to the prurient interest of a clearly defined deviant group. The government contends that expert testimony was unnecessary on counts 7 and 9, and that it was supplied on counts

8, 10, 11, and 12 through cross-examination of defendant's expert witnesses.

In the typical obscenity case, one of the essential elements to be established is that "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Roth* v. *United States*, 354 U.S. 476, 489 (1957); *see also Miller* v. *California*, 413 U.S. 15, 24 (1973). However, material appealing to atypical sexual proclivities may be found "obscene" only when its dominant theme appeals to the prurient interest of members of a "clearly defined deviant sexual group". *Mishkin* v. *New York*, 383 U.S. 502, 508 (1966).

This circuit, in *United States* v. *Klaw*, 350 F.2d 155 (2d Cir. 1965), held that where the prurient interest is of a "deviant segment of society", the government must not only identify the deviant group, but must also establish that the material in question appeals to that group's prurient interest. Both facts are generally established through the use of expert testimony. *Id.* at 166-67; *see also Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56 n.6 (1973) (Supreme Court reserves judgment on the "extreme case", where the materials "are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest", *citing Mishkin* and *Klaw*).

As applied to the case before us, this issue pertains only to counts 7 through 12, because counts 2, 3, 5, and 6 involve photographs of nude, mostly underage, males, on which the trier of fact needs no expert advice to determine the issues of prurient appeal and offensiveness to con-

temporary community standards. *United States* v. *Wild*, 422 F.2d 34, 35-36 (2d Cir. 1969), *cert. denied*, 402 U.S. 986 (1971).

A. *Bondage Counts.*

The material in counts 8, 10, 11, and 12, like that in *Klaw*, is of the "bondage" genre. *See Wild*, 422 F.2d at 35 n.1. These photographs depict nude men and women bound with leather straps and chains, subject to various types of sexual abuse, (counts 8 and 11), as well as genital mutilation and torture (counts 10 and 12). Since such bizarre activity is not directed at the average person, nor does it appeal to the average person's prurient interest, *see Klaw*, 350 F.2d at 167, the government was required to establish the existence of a deviant group to whom such material appeals, and that the material at issue would appeal to such a group. *Id.*

The government contends that it presented sufficient evidence for these purposes through its cross-examination of defendant's expert, Dr. Clive M. Davis. On direct, Dr. Davis had testified that the photographs of bondage, genital mutilation, and torture, which were the subject of counts 8, 10, 11 and 12, did not appeal to the prurient interest of the average person in that "the average person would be uninterested in sexually and unaroused sexually by that material." Dr. Davis acknowledged, however, that the American Scientific Association recognizes sexual sadism as a psycho-sexual dysfunction, and that the materials in evidence dealing with bondage and sadomasochistic activity would be sexually interesting and result in sexual arousal "[f]or some small minority of individuals viewing that material," even though, taken

as a whole, they would not have such an appeal to the average person.

While Dr. Davis, himself, had doubts as to whether activity between consenting adults would constitute "deviance", he conceded that respectable expert opinion in the field, including the manual of the American Scientific Association, classifies bondage, torture, and mutilation activities as deviant even when consented to. We think that the evidence on these issues, developed through Dr. Davis's cross-examination, was sufficient to satisfy the requirements of *Klaw*, and to warrant submission of counts 8, 10, 11, and 12 to the jury. The verdicts of guilty on these counts, therefore, must be affirmed.

B. *Bestiality Counts.*

My colleagues have voted to affirm counts 7 and 9, whose photographs depict nude men and women engaging in various sexual acts with a variety of animals. There is no doubt about their offensiveness to contemporary community standards. But contrary to the position of Judge Lumbard, *infra* at 6608, concurred in by Judge Newman, *infra* at 6599, I think that these pictures are so bizarre that the jury could not have found any appeal to prurient interest simply by examining the photographs. Under *Klaw*, therefore, I believe that expert testimony was necessary to establish that link to obscenity.

On cross-examination of defendant's expert, while the government did establish the existence of a deviant sexual group which suffers from a sexual dysfunction known as zoophilia, the government did not establish that the particular pictures in evidence in counts 7 and 9 would appeal to the prurient interest of a zoophiliac. Absent

such evidence, I would conclude that the proof on counts 7 and 9 was insufficient and that these counts should be dismissed. I therefore dissent from my colleagues' affirmance of these counts.

V. Evidence of Community Standards

Although five counts are being remanded for a new trial, we have no way of knowing whether the new trial will actually occur. Since there may be a new trial, however, and since the issue may arise in other cases, we think it appropriate to comment on the district court's handling of the "comparable" evidence offered by defendant on the issue of community standards by which the obscenity of the photographs in counts 2, 3, 5, and 6 is to be judged.

A key issue in any obscenity case is the degree of community acceptance or toleration of materials similar to those at issue. *See United States* v. *Pinkus*, 579 F.2d 1174, 1175 (9th Cir.), *cert. dismissed*, 439 U.S. 999 (1978); *United States* v. *Womack*, 509 F.2d 368, 376-78 (D.C. Cir. 1974), *cert. denied*, 422 U.S. 1022 (1975). To establish that some or all of the photographs did not offend community standards, Petrov called a private investigator who testified that he had visited a number of bookstores and newsstands in Syracuse and other cities in the Northern District of New York, where he purchased various magazines and books. In opposing the admission of defendant's comparable materials, the government contended that even assuming their comparability, their availability in the community "does not automatically make them admissible as tending to prove the nonobscenity of the materials which the defendant is charged with circulating." *Hamling* v. *United States*, 418 U.S. 87, 125 (1974);

see also United States v. *Manarite*, 448 F.2d 583, 593 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971) ("[m]ere availability of similar materials by itself means nothing more than other persons are engaged in similar activities"). Thus, in addition to availability, the government argued, it must be shown that the proffered materials enjoy "a reasonable degree of community acceptance", before they will be admitted. *Id.* The court sustained the government's objection to most of the material, although it admitted as "comparable" items a series of bondage and genital mutilation photographs from two magazines, "Penthouse" and "Bounty". The court also admitted photographs of the bookstores and outlets where the investigator had purchased these materials.

We recognize the difficulties inherent in attempting to prove a fact as elusive as a community standard; on the other hand, we are uncomfortable with the circularity of the approach suggested by the government, that, in order for the defendant to place comparable photographs in evidence for the purpose of establishing community acceptance, he must first establish the community acceptance. We are also aware of the practical difficulties that would be created by a rule that admitted all comparable materials on the theory that if they were found in the community they were some evidence of community acceptability and community standards.

We think a solution is adequately provided for in the Federal Rules of Evidence, which were not in effect when both *Hamling* and *Manarite* were decided. Comparable material that is available in the community can be viewed as relevant under Rule 401; but whether it should be admitted in a particular trial is a delicate question to be determined by the balancing process of Rule 403, which

requires the trial judge to determine whether the probative value of the particular offer is substantially outweighed by one or more of a variety of considerations, including confusion of the issues, misleading the jury, waste of time, or needless presentation of cumulative evidence. By judicious application of Rule 403, a trial judge can afford the defendant in an obscenity case a fair opportunity to prove that the community displays a reasonable degree of acceptance of comparable material, without needlessly prolonging the trial with cumulative evidence of minimal probative value.

When the district court ruled in this case that some of Petrov's proffered comparable evidence was admissible and some was not, it gave no explanation for its ruling. Effective appellate review of such an issue requires the trial court to explain its decision. This is particularly so when the trial court decides an evidentiary question under Rule 403, which requires it to strike a balance between probative value and the competing considerations. If there is a retrial, and if "comparable" evidence is again offered by Petrov, we expect the trial court to analyze the problem in light of all the circumstances presented at the new trial, and after applying Rule 403, to make clear on the record the reasons for its rulings. *See Pinkus*, 579 F.2d at 1175.

VI. Conclusion

Counts 7, 8, 9, 10, 11, and 12 are affirmed. Counts 1, 2, 3, 5, and 6 are reversed and remanded for a new trial. In view of our reversal of the "child" counts of the indictment, we vacate the sentences on the "adult" counts, counts 7-12, in order to give the district court an opportunity to reevaluate the sentences in this changed

light. We therefore remand for resentencing on those counts. *See United States* v. *Hines*, 256 F.2d 561, 563 (2d Cir. 1958).

JON O. NEWMAN, *Circuit Judge*, dissenting in part:

I disagree with the majority's view that the statute punishing mailing of obscene materials, 18 U.S.C. § 1461 (1982), applies to a photo processor. Until today no reported decision has so construed the statute. I do not believe that Congress intended section 1461 to criminalize the conduct of photo processors who receive film containing obscene pictures taken by members of the public, develop negatives from the film, print photographs, and mail the finished prints back to the senders. Construing the statute to cover photo processors not only distorts a carefully constructed congressional scheme to provide circumscribed restraints on those who print or reproduce certain sexually explicit materials, it also obliges all photo processors to become the censors of the nation's millions of photographers.

The statute is broadly worded. "Whoever" knowingly mails non-mailable matter, including obscene photos, is covered by its literal terms. *Id.* But though the words of a statute are the starting point for construction, they are not necessarily the end of the exercise. Nearly a century ago the Supreme Court confronted a statute that provided criminal penalties for importing an alien to perform "labor or service of any kind." Act of February 26, 1885, ch. 164, 23 Stat. 332, *successor statute repealed by* Immigration and Nationality Act, § 403(a)(13), 66 Stat. 163, 279 (1952). The Government had sought to apply the statute to a church that had imported an alien

minister. Not only did the statute literally apply, but the argument for its application to ministers was strengthened by the statute's specific exclusion of various other occupations. Nevertheless, the Court unanimously construed the statute to be inapplicable to ministers, concluding that Congress most likely had not intended such coverage. *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892).

Only recently, our Court ruled that an all-inclusive term of a criminal statute should be somewhat narrowly construed to avoid results most likely not intended by Congress. *See, e.g., United States v. Pacione*, 738 F.2d 567 (2d Cir. 1984) ("other criminal means," as used in extortionate credit statute, 18 U.S.C. § 891(6) (1982), does not mean *all* other criminal means). Sometimes, of course, we have construed a criminal statute literally, *see, e.g., United States* v. *Weisman*, 624 F.2d 1118, 1123-24 (2d Cir.) ("any offense" in RICO definitional provision, 18 U.S.C. § 1961(1)(D) (1982) includes conspiracy offense), *cert. denied*, 449 U.S. 871 (1980). "There is no automatically 'right' way to decide" whether or not to apply the literal terms of a statute. *United States* v. *Perdue Farms, Inc.*, 680 F.2d 277, 286 (2d Cir. 1982) (Newman, J., concurring). We must examine the particular statute, related statutes, and the consequences of a literal interpretation.

The obscene mail statute derives from the Comstock Act, Act of June 8, 1872, R.S. § 3893, ch. 335, § 148, 17 Stat. 283 (1872). In 1872 no one was mailing film to a photo processor. The "film" of that era was a glass plate that had to be developed on the scene immediately by the

photographer.[1] Not until after the popularity of George Eastman's box camera led to the development in 1895 of film that could be loaded in the light did the industry that we know as photo processing come into existence.[2] No doubt the later Congresses that reenacted the more recent predecessors of section 1461 were aware that the mails were being used by photo processors, but there is no indication that Congress ever considered the application of this statute to such businesses.

More significantly, Congress has given specific consideration to the printing and reproduction of sexually explicit photographs. In 1970, Congress enacted a statute making it a crime to "print, reproduce, or manufacture" any "sexually related mail matter." Pub. L. No. 91-375, § 6(j)(37)(A), 84 Stat. 781 (1970) (codified at 18 U.S.C. § 1737 (1982)). That statute, however, is carefully drawn in a way that does not place at risk every photo

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[1] The "standard method of making photographic negatives" in the 1870's was the wet collodion process. C. Mees, *From Dry Plates to Ektachrome Film* 8 (1961)

> The worker of the wet collodion process had to make his own plates at the time when he wanted to take a picture. He would clean a piece of glass and coat it with collodion in which chemicals were dissolved and then put the plate in a bath of nitrate of silver, which formed silver iodide in the collodion film and made it sensitive to light. The plate had to be exposed in the camera while wet, and the developer had to be poured over it immediately after exposure. It was then fixed and dried. To carry out these operations, a landscape photographer had to carry with him a folding tent which he could set up in the open air.

Id. at 8.

[2] The introduction in 1888 of the first Kodak camera made photography accessible to the general public. The consumer purchased the camera for $25, took one hundred pictures, and returned the entire unit to the Kodak factory for processing. The product was marketed under the slogan, "You press the button, we do the rest." C. Mees, *supra*, at 15-16.

processor of a photograph later determined to be obscene. First, the statute defines "sexually related mail matter" as material within the scope of section 3008(a) or 3010 (d) of Title 39, which cover only sexually explicit *advertisements*. Second, the statute punishes only those who print or reproduce such materials "intending or knowing that such matter will be deposited for mailing or delivery by mail in violation of section 3008 or 3010 of title 39" or of regulations issued thereunder. 18 U.S.C. § 1737(a). Sections 3008 and 3010 of Title 39 prohibit the mailing of certain materials to those who have notified the postal authorities that they do not wish to receive such materials. Section 1737 of Title 18 thus imposes no obligation on a photo processor to decide whether or not a particular photograph is obscene; the statute is violated only by mailing sexually explicit material to unwilling recipients.

Congress next considered photo processors in 1978, when it enacted the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2(a), 92 Stat. 7, 8 (codified at 18 U.S.C. § 2251-2253 (1982)). When Congress was considering the provision of that Act prohibiting shipment of obscene material involving children, 18 U.S.C. § 2252, the Justice Department proposed an amendment to include "any individual who manufactures, reproduces or duplicates" films of child pornography, noting that such an amendment would "enable the bill to cover film processing laboratories." S. Rep. No. 95-438, 95th Cong., 2d Sess. 28 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 40, 63. Even though the Senate drafted a new bill, S. 1585, 95th Cong., 2d Sess. (1978), "to correct a number of faults that the Justice Department had found with" the original bill, S. Rep. No. 95-438, *supra*, at 13, 1978 U.S. Code Cong. & Ad. News at 51, the new bill, which in substance became the enacted ver-

sion, did not adopt the recommendation to include photo processors.

Congress again considered the topic of photo reproduction earlier this year when it enacted the Child Protection Act of 1984, Pub. L. No. 98-292, § 4, 98 Stat. 204. That Act amends 18 U.S.C. § 2252 to include anyone who "knowingly reproduces" child pornography for distribution in interstate commerce or through the mails. Even though the terms of the amended section 2252 are now broad enough to cover photo processors, it is far from clear that Congress intended even this statute to apply to such businesses. The House Report identifies as the object of the new language in section 2252 "the producer who pirates photos from other publications or who purchases photos for reproduction." H.R. Rep. No. 98-536, 98th Cong., 1st Sess. 3 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 492, 494. An ordinary photo processor does neither.

The most compelling reason for not construing section 1461 to apply to photo processors arises from consideration of the consequences of such a construction. Preliminarily, it should be noted that the literal application of the statute to cover "[w]hoever" mails obscene matter would yield a demonstrably unintended result. Under a literal construction, a person would violate the statute if he received in the mail obscene photos that were incorrectly addressed and, after opening the envelope and noticing both the contents and the addressing error, mailed the items back to the sender.

More to the point, it seems most unlikely, for two reasons, that Congress intended the consequences of subjecting photo processors to the coverage of section 1461.

First, such businesses are not, by virtue of the task they perform, part of a distribution network that Congress would understandably wish to prevent from using the mails. A photo finisher typically returns his finished prints to the photographer who sent the film to be developed and printed. If the photos are obscene, that photographer is, in a meaningful way, using the mails to send obscene matter; by contrast, the photo processor is using the mails only to return private property to its owner. Of course, the photo processor who prints a large quantity of photos from a negative or an original print facilitates widespread distribution by others, but even activity of that sort is on the borderline of criminal conduct. *Compare United States* v. *Falcone*, 311 U.S. 205 (1940) (supplier of sugar and yeast to illegal liquor distillers not guilty of bootlegging conspiracy), *with Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943) (supplier of large quantity of morphine sulphate to physician guilty of narcotics conspiracy). In any event, under the Government's reading of the statute, it applies to the photo processor who mails a single print of an obscene photograph back to the photographer. The statute has no quantitative minimum, and the indictment against Petrov does not specify that the obscene photos were printed in quantity. In fact, the evidence on some of the counts consisted of a single photograph.

Second, and more significantly, application of section 1461 to a photo processor obliges him to make a judgment whether every photograph he prints is obscene. It is one thing to impose that burden, with its consequent risk of criminal conviction, upon the person who initiates the mailing of an obscene photo. *See, e.g., Spillman* v. *United States*, 413 F.2d 527 (9th Cir.), *cert. denied*, 396 U.S. 930 (1969); *United States* v. *Peller*, 170 F.2d 1006 (2d

Cir. 1948).[3] It is quite another to impose it upon a photo processor who simply returns to a photographer film that is mailed for developing and printing. In *United States* v. *Dellapia*, 433 F.2d 1252 (2d Cir. 1970), we construed section 1461 to be inapplicable to a person who mailed obscene films upon request to his pen pal. Even if the holding in *Dellapia* has been put in doubt by subsequent Supreme Court decisions, *United States* v. *Orito*, 413 U.S. 139 (1973); *United States* v. *Twelve 200-Ft. Reels*, 413 U.S. 123 (1973); *United States* v. *Reidel*, 402 U.S. 351 (1971), it remains as an important caution that when government seeks to regulate the private transmission of obscene materials, it "enter[s] upon a constitutional danger area." 433 F.2d at 1257. Very likely Congress has the power to punish those who print and mail obscene photos back to their customers. But the concerns expressed in *Dellapia* provide helpful guidance in determining whether Congress has done so in enacting section 1461.

Application of the statute to a photo processor not only puts him at risk every time he prints and returns a photo containing nudity, it also implicates the constitutional rights of those who send film for developing. If the statute applies to photo processors, it is inevitable that they will err on the side of caution and decline to return some photos that display innocent nudity but are not obscene. The photo processor thus becomes the censor of

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[3] Even as to photographers mailing obscene film *to* a photo processor, the reach of section 1461 had been administratively curtailed by the Department of Justice's policy concerning prosecution for mailing private correspondence. *See Redmond v. United States*, 384 U.S. 264 (1966) (conviction vacated at request of Solicitor General, who advised Court that prosecution was contrary to written policy of Justice Department).

the nation's photographers. Worse yet, his actions become a particularly obnoxious form of prior restraint: He condemns the photo before anyone, including the photographer or a neutral magistrate, has had an opportunity to see the finished print. A broad construction of section 1461 thus authorizes by indirection a result very similar to the ex parte condemnation that the Supreme Court has prohibited, *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961). I recognize that every application of section 1461 to a person who distributes someone else's obscene material by mail creates the risk that the distributor will withhold material that he incorrectly concludes is obscene. That risk is tolerable because the originator of the material has numerous outlets of distribution available, and the adverse decision of one distributor does not bar the material from all public scrutiny. But when a photo processor mistakenly concludes that a photo is obscene, he effectively condemns the picture, unless the photographer is willing to travel a considerable distance to retrieve his negative.

The Government's construction also leads to an anomalous result. Since section 1461 is violated only by a person who has knowledge of the contents of the materials he mails, *Hamling* v. *United States*, 418 U.S. 87, 119-24 (1974), the photo processor who fully automates his plant, eliminating all opportunity for employees to to see the finished prints, will very likely avoid prosecution, while the statute will apply to establishments using more conventional equipment.

The risks of construing section 1461 to apply to photo processors were graphically illustrated by one epsisode in this case and the Government's reaction to it. In prepara-

tion for trial, defense counsel sent some of the Government's exhibits to the Eastman Kodak Company to have duplicate prints made. At oral argument, the Government was asked whether Kodak violated section 1461 by mailing the duplicated prints to defense counsel. We were enthusiastically assured that Kodak had violated the statute.

I am questioning only the construction of section 1461, not its constitutionality.[4] If Congress wishes to punish those who print and reproduce obscene photographs and return them to photographers, it may well have constitutional authority to do so. But such regulations should be undertaken with care, as Congress itself has recognized in enacting the limited provisions of 18 U.S.C. § 1737. If a bill amending section 1461 were proposed in Congress explicitly to extend its coverage to photo processors, I have little doubt that the affected industry would be heard from and that, if any such amendment were enacted, it would be carefully written to minimize the problems I have identified. Until Congress makes clear that it wishes to criminalize the action of every photo processor who mails an obscene photograph back to the photographer who sent the film, I would not apply section 1461 to accomplish such a dangerous result.

In this case, a majority of the panel agrees with the Government's application of section 1461 to photo processors. I am therefore obliged to accept that conclusion, much as I disagree with it, and face the other issues in

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[4] Petrov does not explicitly argue that section 1461 should be construed not to apply to photo processors, but his argument that the statute may not constitutionally be applied to photo processors obliges us to consider the preliminary issue of the statute's construction.

this case, especially since the other two members of the panel are divided on some of those issues, and the case must be adjudicated. Having expressed my dissenting views on section 1461, I agree with Judge Pratt's disposition of all the other issues in the case except with respect to counts 7 and 9. As to those two counts, I agree with Judge Lumbard that *United States* v. *Klaw*, 350 F.2d 155 (2d Cir. 1965), is properly understood to require expert testimony that material appeals to the prurient interest of a deviant group only when the material portrays conduct not generally understood to be sexual.

LUMBARD, *Circuit Judge*: (concurring in part and dissenting in part):

I concur in the majority's decision affirming appellant's conviction on counts 8, 10, 11 and 12 of the indictment. However, I would affirm the remaining seven counts of the indictment as well.

On count 1 (conspiracy to violate §§ 2251 and 1461), I agree that § 2251 is inapplicable to photoprocessors, and thus that the § 2251 leg of the conspiracy count must be thrown out. However, as the jury convicted Petrov on ten underlying § 1461 offenses, four of which we now affirm, I conclude the jury would certainly have convicted Petrov of conspiracy if count 1 had been addressed to the underlying § 1461 offenses alone. That normally would be sufficient ground to affirm the conspiracy conviction. *See United States* v. *Anzalone*, 626 F.2d 239, 291 (2d Cir. 1980); *United States* v. *Mack*, 112 F.2d 290, 291 (2d Cir. 1940) (where conspiracy to commit multiple offenses is charged, proof of only one offense sufficient to sustain conspiracy conviction).

Notwithstanding that general rule protecting the valid leg of a conspiracy conviction, the majority finds that the inclusion of the improper § 2251 charge here so prejudiced the jury as to the valid § 1461 charge as to require reversal of the entire conspiracy count. I disagree. Although the government's introduction of the pictures supporting the § 2251 portion of count 1 undoubtedly did not dispose the jury kindly toward Petrov, five of the eleven underlying § 1461 counts also involved allegedly obscene pictures of children. Thus, the government would have been free to argue that one purpose of the conspiracy was to mail "child pornography" or "obscene pictures involving kids" even if § 1461 had been the sole substantive offense charged as to count 1. Under the circumstances, I fail to see how combining the § 2251 charge with the § 1461 charge significantly increased the likelihood of conviction on count 1.

I have similar reservations about the "spillover" argument as applied to counts 2, 3, 5 & 6. As all four counts were based on photographs of children, the government again would have been free to argue to the jury that appellant was guilty of mailing "child pornography" or "obscene photographs involving kids," whether or not it had charged § 2251 in count 1.

As a result, the only possible "spillover" argument I see as to the § 1461 portion of count 1 and counts 2, 3, 5 or 6 concerns not whether the photographs supporting these counts involve *child* pornography, but whether they are pornographic at all. That is, if the photographs were in fact, as the majority contends, "relatively innocuous" viewed on their own, appellant might have a valid argument that the jury would not have found them to be obscene but for the spillover effect from the clearly obscene

photographs of children introduced to support the § 2251 portion of count 1. Having looked at the photographs in question, I conclude that is not the case here. Although the photographs submitted on counts 2, 3, 5, and 6 taken as a whole may be marginally less explicit than those introduced in support of the § 2251 portion of count 1, they were far from "relatively innocuous." Almost all of them depicted children with genitals exposed, standing or lying in sexually suggestive poses. Many are close-up shots of boys' genitals, in several cases with the boys shown fondling themselves, in others, fondling one another. However we might judge the photographs *de novo*, I conclude the jury reasonably could have found them, taken alone, to be pornographic. I would therefore affirm appellant's conviction on counts 1, 2, 3, 5 and 6.

As to counts 7 and 9, Judge Newman and I agree that under *United States* v. *Klaw*, 350 F.2d 155 (2d Cir. 1964), expert testimony is not required to establish the prurient appeal of photographs depicting bestiality. On its facts, *Klaw* applies only to depictions of sadomasochistic activity. The Supreme Court, in endorsing *Klaw* in *Paris Adult Theatres I* v. *Slaton*, 413 U.S. 49, 56 n.6 (1973), left open the question of what other sexual conduct was so bizarre as to require expert testimony as well. The only court thus far to consider whether the rule in *Klaw* should be extended to depictions of bestiality has held that it should not be. *See United States* v. *Thomas*, 613 F.2d 787, 794 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980) (material included, *inter alia*, depictions of "sexual activities between people and animals," *id.* at 791). That conclusion accords with common sense. The photographs submitted on counts 7 and 9, which I take to be typical of the bestiality genre, depict people in various poses engaged in genital intercourse and oral

sex with animals. Unlike the depictions of torture and deformation at issue in *Klaw,* most people would recognize the conduct depicted here as inherently sexual. A jury is therefore competent to evaluate its prurient appeal. *Cf. United States* v. *Thoma,* 726 F.2d 1191 (7th Cir. 1984) (same with regard to pedophilia); *United States* v. *Wild,* 422 F.2d 34 (2d Cir. 1970), *cert. denied,* 402 U.S. 986 (1971) (same with regard to homosexuality). Under the circumstances, it seems a pointless exercise to require an expert to testify to what would be self-evident to the average juror. We would thus hold that the jury was competent to determine for itself, without aid of expert testimony, the prurient appeal of the photographs in question here, and affirm appellant's conviction on counts 7 and 9 as well.

APPENDIX B
OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

United States District Court
Northern District of New York

UNITED STATES OF AMERICA,

v.

ANTHONY PETROV, JAMES MCGANN, and DOUGLAS PINNELL,

Defendants.

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HOWARD G. MUNSON, C.J.

MEMORANDUM-DECISION AND ORDER

Defendants Anthony Petrov, James McGann and Douglas Pinnell have been charged in a December 17, 1982 indictment with one count of conspiracy to violate Title 18 United States Code, Section 2 and Section 1461 and Title 18 United States Code, Section 2 and Section 2251, the Protection of Children Against Sexual Exploitation Act of 1977, and eleven substantive counts of violating 18 U.S.C. § 1461 and 18 U.S.C. § 2.[1] Presently before the Court are motions made by all of the defendants on Februrary 22, 1983 for an order granting a bill of particulars, dismissing the indictment, and suppressing certain evidence. Also before the Court are motions made by all of the defendants on May 2, 1983 for an order: suppressing certain testimony and evidence; striking certain wording from the indictment; dismissing counts II through XII as duplicitous, overboard and multiplicitous; permitting an increase in peremptory challenges; and permitting defense counsel to participate in jury voir dire. Upon a careful consideration of the memoranda of law, affidavits and oral argument presented by both sides, the Court grants in part and denies in part the defendants' motions.

FACTS

Defendant Petrov was at the time of indictment the manager and principal officer of Crystal Photo [Crystal] and Spectra Photo [Specta] located on the same premises in Syracuse, New York.[2] Defendants McGann and Pinnell were managers and supervisors of both businesses. The Federal Bureau of Investigation [FBI] began an undercover investigation of Crystal and Spectra in late 1981. On December 14, 1981 FBI Special Agent Caryl Lamberti, assuming an undercover identity, applied for employment at Crystal and Spectra. Special Agent Lamberti began employment as a printcutter with Crystal and Spectra on December 28, 1981. On April 19, 1982, after a four month undercover investigation of Crystal and Spectra, search warrants were issued and were executed at the Spectra Lab and at the mailing addresses of eight customers located throughout the United States. On December 17, 1982, an indictment was handed down by the grand jury.

Count 1 of the December 17, 1982 indictment charges all three defendants with conspiring with each other and with others known and unknown to the grand jury to knowingly use the United States mails for the mailing, carriage, delivery and receipt of certain "nonmailable" photographic film, prints, and negatives processed for and addressed to a number of customers, in violation of 18 U.S.C. § 1461 and § 2. Count I also charges defendants with conspiring to "use, employ, induce, persuade, entice and coerce various minors to engage in certain sexually explicit conduct...for the purpose of manufacturing and producing photographic film, negatives and prints depicting such conduct...which were thereafter mailed," all in violation of 18 U.S.C. § 2251 and § 2. Each of Counts II through XII charges defendants with knowingly using the United States mails for the mailing, carriage and delivery of certain "nonmailable" photographic film, prints and negatives to particular named customers, in violation of 18 U.S.C. § 1461 and § 2.

DISMISSAL OF THE INDICTMENT

Under the fifth amendment an indictment is subject to dismissal if it is facially invalid or if it was handed down by an illegally constituted or biased grand jury. *See, e.g., United States v. Calandra*, 414 U.S. 338 (1974). Defendants do not allege that the indictment was handed down by an illegally constituted or biased grand jury. Nor do defendants allege that the "extreme sanction of dismissal" is necessary to eliminate prejudice to the accused or to deter a demonstrated widespread pattern of prosecutorial misconduct. *United States v. Artuso*, 618 F.2d 192, 196 (2d Cir.), *cert. denied*, 449 U.S. 861 (1980).

Moreover, defendants are well apprised of the nature of the offenses with which they are charged. *United States v. Trotta*, 525 F.2d 1096, 1099 (2d Cir. 1975), *cert. denied*, 428 U.S. 971 (1976) (citing *Russell v. United States*, 369 U.S. 749, 765 (1962)). The indictment sufficiently tracks the pertinent language of the applicable statutes and specifies the relevant time periods and places of the alleged conspiracy and substantive offenses. *United States v. Trotta*, 525 F.2d at 1099 (citing *United States v. Salazar*, 485 F.2d 1272, 1277 (2d Cir. 1973), *cert. denied*, 415

U.S. 985 (1974). The indictment also provides detail as to the types and nature of "nonmailable" matter, and names each specific customer and his or her address. Thus, the indictment clearly meets the requirements of Fed. R. Crim. P. 7 (c)(1) that it be a "plain, concise, and definite written statement of the essential facts constituting the offense charged."

CONSTITUTIONAL ARGUMENTS

Defendants move to dismiss the indictment on the ground that Section 1461 of Title 18 of the United States Code is unconstitutionally applied in the instant case. Defendants argue that under the Supreme Court's holding in *Stanley v. Georgia*, 394 U.S. 557 (1969), the processing of film and transport of such film through the mails to a customer for his private viewing is protected by the First Amendment. The Court rejects defendants' argument that the right to possess obscene material in the privacy of one's home under *Stanley v. Georgia* creates a correlative right to receive it, transport it, and distribute it. This issue has been addressed by the Supreme Court in *United States v. Reidel*,[3] 402 U.S. 351 (1971) and again in *United States v. Orito*, 413 U.S. 139, 141 (1973), and the constitutionality of 18 U.S.C. § 1461 as applied to those persons transporting, mailing and distributing such "nonmailable" material has been upheld.

Nor does the Court accept the defendants' argument that the privacy cases following *Griswold v. Connecticut*, 381 U.S. 479 (1965) dictate a finding that 18 U.S.C. § 1461 is unconstitutional.[4] The Ninth Circuit dealt with this very issue in *United States v. Young*, 465 F.2d 1096, 1101 (9th Cir. 1972), finding that "[b]y its passage of Public Law 91-662, which became effective as of January 9, 1971, Congress amended § 1461 by deleting all references to contraception from its provisions, thereby conforming with the spirit of *Griswold* and preserving the entire statute from attack on this ground." *See also United States v. Levy*, 331 F. Supp. 712, 713 (D. Conn. 1971).

Defendants next argue for dismissal of the indictment on the ground that Congress did not intend that 18 U.S.C. § 2251 be applied to film processors. Defendants are charged not with

substantive violations of § 2251, but rather with conspiracy to violate that section. Defendants' argument is rejected for two reasons. First, defendants' contention that § 2251 does not apply to film processors would seem to contradict the plain language of that section and of the definitional section, 18 U.S.C. § 2253, as well as the recent case law on the subject.

Section 2251 imposes a penalty on "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of *producing* any visual or print medium depicting such conduct...." The definition of "producing" is "producing, directing, manufacturing, issuing, publishing, or advertising, for pecuniary profit...." The definition of "visual or print medium" includes film, photographs, negatives, and slides." 18 U.S.C. § 2253. The scope of §§ 2251 *et. seq.* by its plain language encompasses the processing of film which meets the content requirements of these sections. Furthermore, a review of the legislative pupose and history of the Protection of Children Against Sexual Exploitation Act of 1977 makes clear that the statute is directed at those persons involved not only in the direct staging of such prohibited photographs, films, negatives, slides and other visual matter but also those persons involved in the slightly more removed, yet as profitable, stages of processing and reproducing negatives into finished photos. *See* Joint Explanatory Statement of the Committee of Conference, *reprinted in* 1978 U.S. Code Cong. & Ad. News 40, 44, 69-71.

The Seventh Circuit in the very recent case, *United States v. Langford*, 668 F.2d 1088, 1097 (7th Cir. 1982) states in this regard:

> [O]ur review of the legislative history of the pornography statutes shows that Congress was concerned with the overall chain of commercial pornography, from the taking of the obscene pictures, the processing of the prints, to the ultimate sale of the obscene prints and that Congress clearly intended that § 2251 *et seq.* eradicate the entire commercial chain involved in the production, distribution and sale of child pornography.

Judge Wood in his concurring opinion in *Langford*, *id.*, expressed "no doubts about the mailing of film to a laboratory for processing and the return of negatives to the sender as qualifying under the statute...."

Finally, defendants are charged under 18 U.S.C. § 371 with conspiracy to violate 18 U.S.C. § 2251. The elements of a conspiracy which have been alleged in this case and must be proven at trial are: "(1) an agreement; (2) a combination of two or more persons; (3) an unlawful purpose; [and] (4) an overt act committed by one of the conspirators in the furtherance of the conspiracy." *Cross v. United States*, 392 F.2d 360, 362 (8th Cir. 1968). "The essence of the charge of conspiracy is the agreement or confederation to commit a crime, and that is what is punishable as a conspiracy, if any overt act is taken in pursuit of it. The agreement is punishable whether or not the contemplated crime is consummated. But the same overt act charged in the conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself." *United States v. Bayer*, 331 U.S. 532 (1947); *United States v. Giordano*, 693 F.2d 245, 249 (2d Cir. 1982). *See also Callanan v. United States*, 364 U.S. 587 (1960) (conspiracy and substantive offenses are distinct and separate offenses and may accordingly be punished by consecutive sentences.) "A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object." *Braverman v. United States*, 317 U.S. 49, 54 (1942)(citing *United States v. Rabinowich*, 238 U.S. 78, 87-89 (1915). Proof of the substantive crime is not essential to prove the conspiracy, *see United States v. Morello*, 250 F.2d 631, 635 (2d Cir. 1957).

SCIENTER ARGUMENT

Defendants argue for dismissal of the indictment on the grounds that as photo processors they are not able to and should not be required to judge for purposes of 18 U.S.C. § 1461 whether the film that they are processing meets the legal definition of obscenity. The Supreme Court rejected this very argument in *United States v. Hamling*, 418 U.S. 87, 123-124 (1973):

> It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. § 1461 nor by the Constitution.

PANDERING

Defendants also seek to dismiss the indictment on the grounds that it does not adequately allege the crime of "pandering." Under 18 U.S.C. § 1461 "[s]ince pandering is only a relevant factor, and not an essential element of the crimes charged, it need not be alleged specifically in the indictment...." *United States v. Levy*, 331 F. Supp. at 713. Nor is "pandering" an essential element of a conspiracy charge under 18 U.S.C. § 371. *See* discussion, *supra* at 7. Thus, defendants' motion is denied as without merit.

BILL OF PARTICULARS

Defendants seek an order requiring the Government to provide a bill of particulars. The granting of a bill of particulars is solely within the discretion of the Court. *Wong Tai v. United States*, 273 U.S. 77 (1927); *United States v. Tramunti*, 513 F.2d 1087 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Greater Syracuse Board of Realtors, Inc.*, 438 F. Supp. 376, 379 (N.D.N.Y. 1977). The purpose of a bill of particulars is to apprise the defendant of such facts as are necessary to advise him of the crime with which he is charged. *United States v. Frey*, 79-CR-78, 79-CR-79 (N.D.N.Y. July 25, 1979) (citing *United States v. Salazar*, 485 F.2d at 1272). However, a bill of particulars may not be used to ascertain evidentiary details, names of prospective witnesses or legal theories of the Government. *United States v. Frey, id.*, (citing *United States v. Gottlieb*, 493 F.2d 987 (2d Cir. 1974). Factors to be considered in determining whether to grant a bill of particulars are: 1) whether the defendant can diligently investigate and prepare

his defense; 2) whether the defendant would be subject to prejudicial surprise at trial; and 3) whether the defendant could raise a plea of double jeopardy in any subsequent prosecution of the same offense. *United States v. Frey, id.*

As stated above, defendants have been well apprised of the essential facts constituting the offenses charged. The Government has indicted the three named conspirators and alleges that there were other conspirators "known and unknown to the Grand Jury." The Government need not list all the known or unknown conspirators, *see United States v. Dimasse and Sullivan*, 81-CR-128 (N.D.N.Y. May 1982) (citing *Rogers v. United States*, 340 U.S. 367 (1951); *United States v. Allesio*, 633 F.2d 466, 473 (2d Cir. 1980); nor is the Government required to specify every means or manner utilized in committing the offenses charged. *See United States v. Moore*, 81-CR-120 (N.D.N.Y. July 3, 1982). Here, it is sufficient that the Government has listed sixteen methods and means by which the defendants are alleged to have effectuated the objects of the conspiracy. The Government is not required to allege every overt act, *see United States v. Carroll*, 510 F.2d 507 (2d Cir.), *cert. denied*, 426 U.S. 923 (1976), and in the instant case the indictment adequately alleges four overt acts. The indictment provides sufficient information as to the time, place, and methods of the conspiracy, and defendants are not entitled to further information as to the place of the conspiracy's origin, and the date of and location where each coconspirator and each defendant joined the conspiracy. *Compare United States v. Simon*, 30 F.R.D. 53 (S.D.N.Y. 1962). The phrase "direction thereon" in count II is directly quoted from 18 U.S.C. § 1461 and further particularization of the meaning of that term is unnecessary.

The remainder of defendants' requests are denied because they seek details of the Government's evidence and legal theories and to provide defendants with such information would severely limit the Government's presentation of proof at trial.[5] Furthermore, the Government has agreed to provide certain requested information through pretrial discovery,[6] and other of the requested information is more likely in the defendants' control

than in the Government's control at this time.[7] Thus, defendants' request for a bill of particulars is denied in full.

MOTION TO STRIKE

Defendants by their motions of May 2, 1983 seek to strike from the instant indictment the words (1) "lewd, lascivious, indecent, filthy and vile" and (2) "[t]o use, employ, induce, persuade, entice and coerce various minors to engage in certain sexually explicit conduct...." Under Fed. R. Crim. P. 7 it is within the Court's discretion whether to strike the language. Defendants' motion is denied because the language is quoted directly from the applicable statutes 18 U.S.C. § 1461 and 18 U.S.C. § 2251 *et seq.* Evidence of the allegations is relevant to the charge against the defendants and inclusion of this particular language is necessary to adequately apprise the defendants of the charges against them. *United States v. DePalma*, 461 F. Supp. 778, 797 (S.D.N.Y. 1978)("[I]f evidence of the allegation is admissable and relevant to the charge, then regardless of how prejudicial the language is, it may not be stricken. The Government may broadly allege that which it intends to prove and that which, under applicable principles of law it may prove. The language of the Indictment cannot be more prejudicial than the evidence offered to sustain it. If the allegation is of matters by which the Government hopes to establish the charge, then such allegations can scarcely be called 'surplusage." (citations omitted)). *See also* 1 Wright, Federal Practice and Procedure: Criminal 2d § 127 at 425 (1982); *United States v. Sciandra*, 529 F. Supp. 320 (S.D.N.Y. 1982).

DUPLICITY

Defendants' May 2, 1983 motion to dismiss counts II through XII as duplicitous, overboard, and charging multiple crimes is denied.[8] The Second Circuit stated in *United States v. Margiotta*, 646 F.2d 729, 732-733 (2d Cir. 1979) that:

> "[i]f the doctrine of duplicity is to be more than an exercise in mere formalism, it must be invoked only when an indictment affects the policy considerations" that underlie that doctrine. These include avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a

> finding of not guilty as to another, avoiding the risk that the jurors may not have been unanimous as to anyone of the crimes charged, assuring the defendant adequate notice, providing the basis for appropriate sentencing, and protecting against double jeopardy in a subsequent prosecution. The identification of these considerations suggests that a single count of an indictment should not be found impermissibly duplicitous whenever it contains several allegations that could have been stated as separate offenses, but only when the failure to do so risks unfairness to the defendant.

(Citations omitted).

In the instant case, each of counts II through XII charges the defendants with mailing specifically described "non-mailable" material to one particular customer. Each count specifies the customer's name and address and states the relevant time period during which the mailing occurred.

The language of 18 U.S.C. § 1461 would allow the Government to charge as a separate offense each mailing of each individual piece of "non-mailable" matter, thus exposing the defendants to the maximum statutory penalty on each of those additional counts. The Government's decision to charge in one count all of the mailings to one customer, *i.e.*, as an overall scheme, instead of as numerous separate counts does not prejudice the defendants in any way. Rather, reducing the number of counts against each defendant "achieves the obvious benefit of limiting the maximum penalties defendant[s] may face if convicted...and also avoids the unfairness of portraying the defendant to the jury as the perpetrator of [numerous more] crimes." *Id.* at 733.

Furthermore, defendants may request the submission of special interrogatories to the jury. Although the submission of such special interrogatories is generally disapproved of in criminal cases, submission may be granted as long as there is no potential prejudice to any of the defendants. *Id.*

VOIR DIRE

Defendants by their May 2, 1983 motion request permission to participate in the voir dire of prospective jurors. In light of this Court's participation in the Second Circuit's current study of federal jury voir dire procedures, jury selection will proceed in the following manner. First, the Court will conduct the voir dire of prospective jurors utilizing questions suggested in advance by counsel. Subsequent to the Court's questioning and prior to the exercise of challenges, each attorney will be allowed to question the panelists for a maxmimum of ten minutes. The attorneys are advised that their questioning must be designed to elicit data relevant to the exercise of challenges, not to argue the case or establish jury rapport. The defense attorneys are requested to make every effort to avoid repetitious questioning of panelists. The Court will further instruct counsel with regard to the appropriate voir dire procedures in chambers prior to jury selection.

PEREMPTORY CHALLENGES

Under Fed. R. Crim. P. 24(b) defendants jointly are entitled to ten peremptory challenges, however, it is within the Court's discretion under Rule 24(b) to allow additional peremptory challenges in a case involving more than one defendant. In the instant case, the Court grants defendants an additional five peremptory challenges to be shared jointly.

SUPPRESSION MOTIONS

Defendants move pursuant to Fed. R. Crim. P. 41(e) and 41(f) to suppress certain evidence. First, by their motions of February 22, 1983, defendants seek to suppress certain evidence seized from the Spectra/Crystal premises pursuant to a search warrant issued by this Court on April 19, 1982. Defendants argue that the warrant was facially invalid because it was overbroad, did not support the elements of the offenses sought to be charged

and left too much discretion in the searching officers. Defendants further agrue for suppression on the ground that the warrant and application: (1) were based upon hearsay evidence of the undercover agent Caryl Lamberti; (2) failed to state that defendants knew the contents of the material which was mailed from Spectra and Crystal; (3) failed to state that the defendants were involved in the sexual exploitation of children; (4) failed to state that the materials were mailed; (5) were based upon evidence allegedly illegally seized by Special Agent Lamberti during her undercover investigation; and (6) the judicial officer issuing the warrant did not personally view the objectionable material.

In addition defendants, by their motions of May 2, 1983, seek to suppress: (1) all testimony by Special Agent Lamberti with regard to any observations between Lamberti and the defendants and/or any employees of Crystal and Spectra; (2) any evidence seized pursuant to search warrants issued by this Court on February 25, 1982, March 4, 1982, March 5, 1982, March 18, 1982 and April 2, 1982 to open specifically described envelopes mailed by Crystal and Spectra. Defendants also seek to supress any testimony by the FBI special agents about their observations of the envelopes and their contents; (3) any evidence (particularly any and all photographs, film, envelopes, and letters allegedly emanating from Crystal/Spectra) seized pursuant to a search warrant issued by United States Magistrate Volney v. Brown, Jr. on April 19, 1982 and executed on April 20, 1982 at a Huntington Beach, California premises and a search warrant issued on April 19, 1982 by United States Magistrate Laurence S. Margolis and executed at a Washington, D.C. premises and any testimony by FBI agents or any other individuals about their observations of the search and seized evidence; and (4) any and all evidence seized pursuant to any warrants which were issued in whole or in part on the basis of Special Agent Lamberti's undercover work at Crystal/Spectra during the period December 28, 1981 through April 19, 1982.

Defendants' motions are denied in full as follows. First, defendants' May 2, 1983 motion to suppress certain evidence seized

during a search of two premises, one in Huntington Beach, California and one in Washington, D.C., is denied because none of the defendants has "standing" to challenge these searches and seizures. "It is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the [exclusionary] rule's protection." *United States v. Rebol*, 80-CR-140 (N.D.N.Y. May 28, 1981) (quoting *Rakas v. Illinois*, 439 U.S. 128, 134 (1978); *United States v. Salvucci*, 448 U.S. 83, 87 (1980)).

None of the defendants has met his burden of demonstrating that he had a "legitimate expectation of privacy," *Rakas v. Illinois*, 439 U.S. at 143, in either of the places searched or any of the items seized. "In assessing whether the defendants have met their respective burdens, one or more of the following factors may come into play: whether a defendant had access to the area, whether a defendant had the right to exclude other persons from access, whether the defendant took reasonable precautions to preserve his or her privacy, how the defendant used the area, and whether the defendant expressed that he or she had a subjective expectation of privacy." *United States v. Rebol*, 80-CR-140 at 22 (citing *Rawlings v. Kentucky*, 448 U.S. 98, 104-105 (1980); *Rakas v. Illinois*, 439 U.S. at 143-144 n. 12; *id.* at 152-153 (Powell, J., concurring); *United States v. Sanchez*, 635 F.2d 47, 64 (2d Cir. 1980); *United States v. Arboleda*, 633 F.2d 985, 991 (2d Cir. 1980); *United States v. Smith*, 621 F.2d 483, 487 (2d Cir. 1980). Defendants have made no showing, and the Court is at a loss to find, that defendants had any such interest in either of the searched premises.

Defendants' motion to suppress evidence seized from Spectra and Crystal pursuant to the April 19, 1983 search warrant issued by this Court is also denied. Defendants argue that the April 19, 1982 search warrant was invalid because it was based upon Special Agent Lamberti's allegedly illegal seizure of certain photographs which had been placed in a shredding bin under Lamberti's control at the Crystal/Spectra lab. The Court rejects this argument in full, first and most importantly, because the search warrant application disclosed probable cause independent of the evidence derived from Lamberti's allegedly

illegal search of the shredding bin. *United States v. Terry*, No. 82-1125 (2d Cir. Feb. 18, 1983)(citing *Franks v. Delaware*, 438 U.S. 154, 171-172 (1978). This Court did not see these photographs at the time that it made its findings of probable cause because the photographs were not presented to the Court at that time. The finding of probable cause was based solely upon the independent and very specific, detailed and current, *see United States v. Beltempo*, 675 F.2d 472, 477 (2d Cir.), *cert. denied*, 102 S. Ct. 2963 (1982), personal observations by Lamberti of the numerous instances in which photographs of an obscene nature and photographs involving children were processed and returned to the customers, instances in which orders for numerous prints were processed, observations of the intricate filing and computer system for dealing with these confidential customers, as well as the accounts by other employees of the activity at Crystal/Spectra labs.

Second, defendants' argument that the search warrant is invalid because the application was based upon hearsay is without merit.

> While a warrant may issue only upon a finding of 'probable cause,'...the term 'probable cause;...means less than evidence which would justify condemnation,' and...a finding of 'probable cause' may rest upon evidence which is not legally competent in a criminal trial. 'There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them.' Thus hearsay may be the basis for issuance of the warrant 'so long as there [is] a substantial basis for crediting the hearsay.' '[A]n affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,' so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiants conclusions and his belief that any informant involved 'whose identity need not be disclosed...was 'credible' or his information 'reliable."

United States v. Ventresca, 380 U.S. 102, 108 (1965). Specifically, "[o]bservations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." *United States v. Ventresca*, 380 U.S. at 111.

Moreover, to support its assertion of probable cause, the Government need not have specified in the warrant application that the defendants knew the contents of the material that was mailed, that the defendants were involved in the sexual exploitation of children, nor that the material was mailed. Nor did the warrant itself have to state such details. The warrant application and the warrant were sufficiently detailed as to the nature of the materials sought and the allegedly illegal activity taking place at Crystal and Spectra and both these documents tracked the language of the applicable statutes.

Defendants' arguments that the warrant was overboard and left too much discretion in the federal officers is also without merit. The warrant specifically and adequately described the areas to be searched and the items to be searched for.

The several warrants issued by this Court for search of certain mail were also supported by probable cause based upon information obtained through Lamberti's undercover investigation at Crystal and Spectra. The mail search warrants also specifically described the envelopes to be searched and provided the names and addresses of the customers to whom the envelopes were mailed.

Finally, defendants argue that Special Agent Lamberti's undercover placement with Crystal and Spectra violated their constitutional rights and they seek exclusion of *any* evidence derived as a result of her undercover work, any observations she made, any conversations she may have been engaged in or overheard, and, generally, any testimony by her. Defendants' arguments are wholly without merit and their motion in that regard is denied. Based upon a long line of cases beginning with *Hoffa v. United States*, 385 U.S. 293 (1966), *United States v. White*, 401 U.S. 745 (1971), and *Lewis v. United States*, 385 U.S. 206 (1966), it is eminently clear that Lamberti's undercover placement implicated no Fourth Amendment interest.

> [H]owever strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances, "no interest legitimately protected by the Fourth Amendment is involved," for that amendment affords no protection to a "wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." No warrant to "search and seize" is required in such circumstances, nor is it when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused, or when the same agent, unbeknown to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence.

United States v. White, 401 U.S. at 749 (citations omitted). Nor did Lamberti's photographing her observations implicate a Fourth Amendment interest. *Id.*

CONCLUSION

For the foregoing reasons, defendants' motions are granted in part and denied in part.

It is so Ordered.

Dated: June 13, 1983

Syracuse, New York

/s/ _____

Howard G. Munson
Chief U.S. District Judge

FOOTNOTES

[1] 18 U.S.C. § 1461 provides in pertinent part:

> MAILING OBSCENE OR CRIME-INCITING MATTER
>
> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and - . . .
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and
>
> Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and . . .
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered to the person to whom it is addressed or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years or both, for each such offense thereafter. . . .

18 U.S.C. §2 provides:

> PRINCIPALS
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2251 provides:

SEXUAL EXPLOITATION OF CHILDREN

(a) Any person who employs, uses, persuades induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

(c) Any person who violates this section shall be fined not more than $10,000 or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $15,000, or imprisoned not less than two years nor more than 15 years, or both.

18 U.S.C. § 371 provides:

CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[2] The indictment against defendants alleges that as part of the conspiracy the defendants conducted, advertised and solicited business for an illegal "confidential photo processing" business known as "Spectra Photo Labs," and defendants concealed this illegal activity by utilizing as "over the counter" family photo processing business known as "Crystal Photo Labs.".

[3] Each of the defendants argues that the application of 18 U.S.C. § 1461 violates his First Amendment right of freedom of speech. The Supreme Court in *Reidel*, 402 U.S. at 351-352 stated that:

> The right Stanley asserted was "the right to read or observe what he pleases - the right to satisfy his intellectual and emotional needs in the privacy of his own home." The Court's response was that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." The focus of this language was on freedom of mind and thought and on the privacy of one's home. It does not require that we fashion or recognize a constitutional right in people like Reidel to distribute or sell obscene materials. The personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution.
>
> Reidel is in a wholly different position. He has no complaints about governmental violations of his private thoughts or fantasies, but stands squarely on a claimed First Amendment right to do business in obscenity and use the mails in the process. But *Roth* has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today. *Stanley* did not overrule *Roth* and we decline to do so now.

[4] Defendants' reliance on *United States v. Dellapia*, 433 F.2d 1252 (2d Cir. 1970) in arguing that defendants' "mailing of photos to private parties only constitutes private communication which is constitutionally protected" is misplaced. The Second Circuit spoke in *Dellapia* prior to the Supreme Court's clear pronouncement in *Reidel*, and the *Dellapia* Court, 433 F.2d at 1259 n. 34, specifically relied upon the lower court's opinion in *Reidel*.

Further, defendants argue relying upon *United States v. Sidelko*, 248 F. Supp. 813 (M.D. Pa. 1965), that the customers receiving these processed photos are not punishable and hence photo processors should not be punishable under 18 U.S.C. § 1461. This argument is without merit in light of the Supreme Court's subsequent decision in *Reidel*, that the *Stanley v. Georgia* zone of privacy does not extend beyond the private home use of such materials.

[5] Specifically, defendants seek the Government's proof regarding the manner in which defendants' illegal activity was concealed, dates on which evidence of crime was destroyed, and any words and conduct by defendants about each confidential customer.

[6] Specifically, certain customers' names and addresses have already been provided by the Government, and the Government has agreed to provide additional information including birth dates for those customers or person in the photos whom the Government intends to call as witnesses. The Government has already provided the photographs underlying each count.

[7] The extent of defendants' financial or other interest in Crystal and Spectra is information more likely in the almost exclusive control of the defendants.

[8] "The vice of multiplicity is that it may lead to multiple sentences for the same offense . . . . The yardstick in determining whether there is duplicity or multiplicity is whether one offense or separate offenses are charged, . . . this is a difficult and subtle question. 1 Wright, *Federal Practice and Procedure:* Criminal 2d § 142 at 476. In the instant case, defendants claim seems to be one of duplicity and not multiplicity.

APPENDIX C
JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of October one thousand nine hundred and eighty-four.

Present: Hon. J. Edward Lumbard
Hon. Jon O. Newman
Hon. George C. Pratt

Circuit Judges,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against 83-1401

ANTHONY PETROV,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed in part and remanded in part to the said district court for further proceedings in accordance with the opinion of this court.

ELAINE B. GOLDSMITH, Clerk

/s/
by Edward J. Guardaro, Deputy Clerk

APPENDIX D

ORDER ON REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of November one thousand nine hundred and eighty-four.

UNITED STATES OF AMERICA,

Appellee,

v. No. 83-1401

ANTHONY PETROV,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Anthony Petrov,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED. Judge Newman dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/
Elaine B. Goldsmith
Clerk